UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 25

CNH AMERICA, LLC,)	
Employer,)	
and)	G N 25 DG 116560
INTERNATIONAL BROTHERHOOD OF)	Case No. 25-RC-116569
BOILERMAKERS, IRON SHIP BUILDERS,)	
BLACKSMITHS, FORGERS, AND HELPERS, AFL-CIO)	
Art-Clo)	
Petitioner.)	
	_)	

PETITIONER'S STATEMENT IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION ISSUED BY REGIONAL DIRECTOR

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Petitioner, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, ("the Union" or "Petitioner"), by and through its attorneys of record, submits the following Statement in Opposition to Employer's Request for Review of Decision and Direction of Election Issued by the Regional Director in connection with the above-captioned case pursuant to Section 102.67(e) of the NLRB Rules and Regulations.

I. INTRODUCTION & BACKGROUND

Petitioner filed an election petition to represent a unit including all full-time welding employees working for CNH America, LLC (hereinafter "the Employer" or "CNH") at its Goodfield, Illinois, facility excluding all temporary employees, research and development employees, all other employees, professional employees, office clerical employees, guards, and

supervisors as defined in the Act. Bd. Exh. 2. The Union also sought to exclude Team Leads from the unit as supervisors. Tr. 9.

This matter came before a hearing officer of Region 25 of the National Labor Relations Board on November 14-15, 2013, in Peoria, Illinois, to determine an appropriate unit for collective bargaining. At this hearing, the Employer argued the Region should not direct an election in any unit smaller than a wall-to-wall production and maintenance unit, including Team Leads. Tr. 8, 14.

On December 20, 2013, Regional Director Rik Lineback issued a Decision and Direction of Election, concluding that "the petitioned-for unit of employees in the welding classification is an appropriate unit for purposes of collective bargaining and the Employer has failed to carry its burden of showing that only a larger unit is appropriate." RD Dec. p. 8. As a result, the Regional Director found "[t]he following employees of the Employer constitute *a unit appropriate* for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time and regular part-time welding employees and welding department team leads employed by the Employer at its facility located in Goodfield, Illinois, but excluding all temporary employees, research and development employees, all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act." RD Dec. p. 2. (emphasis added). (hereinafter, the "Approved Unit").

The Regional Director did not find that the unit proposed by the Employer was inappropriate, rather, he found the Employer failed to show that its proposed unit shared "an

¹ References to the Transcript shall appear as (Tr. _.). References to the Decision and Direction of Election shall appear as (RD Dec. _.). References to the Employer's Request for Review shall appear as (Er. RR _). References to Board Exhibits shall appear as (Bd. E._.). References to Employer Exhibits shall appear as (Er. Ex. __.). References to Petitioner Union Exhibits shall appear as (U. Ex. __.).

overwhelming community of interest with the welding employees," relying on the Board's decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011), *enf'd* 727 F.3d 552 (6th Cir. 2013). RD. Dec. p. 2. The Regional Director also concluded that the Team Leads are not supervisors under the Act and therefore "Team Leads who work in the Welding Department are included in the Unit." RD Dec. p. 9.

On January 3, 2014, the Employer filed its Request for Review pursuant to Section 102.67 of the Board's Rules and Regulations. In its Request for Review, the CNH argues the Regional Director's Decision is clearly erroneous on substantial factual issues with respect to two of the eight "community of interest" factors² – separate supervision and interchange – and also generally argues that the Approved Unit is not an identifiable group that shares a community of interest. Also in its Request for Review, the Employer argues a substantial question of law and policy is raised because the Regional Director's decision applied *Specialty Healthcare* and did not approve the unit proposed by the Employer, which it contends was presumptively appropriate. Specifically, the Employer argues the Board's pronouncements in *Specialty Healthcare* are irrelevant and inapplicable to this matter because of the supposed existence of a "presumptively appropriate" unit.³ Er. RR p. 40.

The Board should reject and deny the Employer's Request for Review. As noted below,

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² The community of interest factors are whether the employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; (4) are functionally integrated with the Employer's other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

³ The Employer's Request for Review does not challenge the inclusion of the Team Leads in the unit. (Er. RR n.4).

the Regional Director's decision is sound, there are no clearly erroneous substantial fact issues, the Employer mischaracterizes and vastly overstates the nature of the record, and *Specialty Healthcare* was appropriately applied by the Regional Director.

II. STANDARD: REQUEST FOR REVIEW

Under Section 102.67(c), "[t]he Board will grant a request for review only where *compelling reasons* exist." "Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of
 - (i) the absence of, or
 - (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy." Section 102.67(c), Board Rules and Regulations (emphasis added).

The Employer has only sought review on Subsections (1) and (2) of 102.67(c). As will be shown, however, no compelling reasons have been shown and the Employer's Request for Review should be rejected and denied.

III. SPECIALTY HEALTHCARE WAS APPROPRIATELY APPLIED BY THE REGIONAL DIRECTOR WHEN FINDING THE APPROVED UNIT.

As explained in *Specialty Healthcare*, 357 NLRB No. 83 (2011), *enf'd* 727 F.3d 552 (6th Cir. 2013), the analysis for determining a bargaining unit appropriately begins with the

petitioned-for unit. *Specialty Healthcare*, 357 NLRB at *4. "[W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." *Id.* at *12 (footnotes omitted). Additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude [the] employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Id.* at *16, and n.28 (*quoting Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421, 422 (D.C. Cir. 2008)).

Relying on *Specialty Healthcare*, the Regional Director agreed with the Union and found that "the petitioned-for unit of employees in the welding classification is an appropriate unit for purposes of collective bargaining...," and further found that the Employer failed to show that its proposed unit shared "an overwhelming community of interest with the welding employees." RD Dec. p. 2, 8.

The Employer, however, contends that the Regional Director's decision raises a "substantial question of law or policy" because the Board's decision in *Specialty Healthcare* is irrelevant to this case and "did not affect the presumptions applicable to appropriate units in a manufacturing plant." Er. RR p. 34.

In effect, the Employer is attempting to turn Specialty Healthcare on its head and suggest

that the existence of a "presumptively appropriate" unit does not make it necessary for the Employer to show "employees in the [proposed] larger unit share an overwhelming community of interest with those in the petitioned-for unit." *Specialty Healthcare*, 357 NLRB at *12. The Employer argues that to find *Specialty Healthcare* applicable to this matter would be a "substantial departure" from Board precedent. Er. RR p. 40. This argument can be easily rejected as it wholly ignores well-settled Board precedent and the direct pronouncements of the Board in *Specialty Healthcare*.

It is well-settled Board law that a union need not seek to represent the most appropriate unit or most comprehensive unit, but only an appropriate unit. See Overnite Transportation Co., 322 NLRB 347, 350 (1996) ("It is well settled that the Board requires a labor organization to seek not the most appropriate or most comprehensive unit, but only an appropriate unit."); Transerv Systems, 311 NLRB 766 (1993) ("A petitioner need seek only an appropriate unit for collective bargaining purposes."); P. J. Dick Contracting, 290 NLRB 150, 151 (1988) ("Board inquiry pursues not the most appropriate or comprehensive unit but simply an appropriate unit."); Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950) ("There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate."). The Board reiterated this precedent in Specialty Healthcare: "Because a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate. More must be shown." Specialty Healthcare, 357 NLRB at *15.

CNH, much like the employer in Specialty Healthcare, has failed to grasp that the Board

only requires such *an* "appropriate" unit. The *Specialty Healthcare* Board found arguments for a single unit are contrary to and at odds with the statutory language and its precedent:

[T]he suggestion that there is only one set of appropriate units in an industry runs counter to the statutory language and the main corpus of our unit jurisprudence, which holds that the Board need find only that the proposed unit is *an* appropriate unit, rather than the most appropriate unit, and that there may be multiple sets of appropriate units in any workplace. *Id.* at * 10.

The *Specialty Healthcare* Board ultimately concluded that "[a]ccepting the Employer's position 'would stand on its head the statutory concept of an appropriate unit." *Id.* at *11 (*quoting Overnite*, 322 NLRB at 725).

The Board went even further and expressly found that the existence of a presumptively appropriate unit does not alter the burden on the petitioning party:

[T]he Employer suggests not that *Park Manor* creates a presumption that the units defined in the rule are appropriate in nonacute care facilities, but that *Park Manor* holds that those units are the *only* appropriate units absent exceptional circumstances. The Employer's suggestion is at odds with our unit jurisprudence. A party petitioning for a unit other than a presumptively appropriate unit (when one exists, as it does here) bears no heightened burden to show that the petitioned-for unit is also an appropriate unit. The existing presumptions are thus consistent with the statutory requirement that the proposed unit need only be an appropriate unit, because they merely shift the burden to the party arguing that a petitioned-for and presumptively appropriate unit is inappropriate. *Id*.

As a result, it is clear that the Employer is either misreading or ignorant to the principles set forth in *Specialty Healthcare*. In fact, in *Specialty Healthcare*, the Board made it explicitly clear what it was holding:

We set out a clear test ... for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees. *In such cases, the employer must show that the excluded employees share an* "overwhelming community of interest" with the petitioned-for employees. *Id.* at *20. (emphasis added)

Despite this abundantly clear language and pronouncement from the Board, the Employer tries to argue that the "overwhelming" standard does not apply in this case. Notably, this

argument is seemingly a continuation of the unnecessary litigation the Board sought to resolve in issuing its decision in *Specialty Healthcare*.⁴

A. Industry Presumptions Are Not Determinative

Since issuing the decision in *Specialty Healthcare*, the Board has applied its decision in myriad industries, including a manufacturing setting. *See Northrup Gruman*, 357 NLRB No. 163 (2011)); *see also DTG Operations, Inc.*, 357 NLRB No. 175 (2011) (car rental agency), *Guide Dogs For the Blind, Inc.*, 359 NLRB No. 151 (2013) (dog training facility), *Fraser Engineering Company, Inc.*, 359 NLRB No. 80 (2013) (engineering department), and *Odwalla, Inc.*, 357 NLRB No. 132 (2011) (drivers at a juice-making plant).

Regarding the application of an industry presumption, the Board has rejected the notion that such presumptions are determinative. For example, in *Northrup Gruman*, *supra*, a Board majority affirmed the Regional Director's finding that a departmental unit of radiological control technicians, calibration technicians, laboratory technicians, and RCT trainees was appropriate for bargaining. In doing so, the Board had an opportunity to apply the presumption for technicians that "[w]hen technical employees work in similar jobs and have similar working conditions and benefits, the only appropriate unit for a group of technicals must include all such employees similarly employed." *Northrup Gruman*, 357 NLRB at *5 (*quoting TRW Carr Division*, 266 NLRB 326, 326 (1983)). Declining to include other technical employees outside of the radiological control department in the unit, the Board applied *Specialty* and noted that "the Act

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⁴ In an earlier *Specialty Healthcare* decision, the Board set out to clearly announce its standards for determining if a proposed unit is an appropriate unit which had previously "long been criticized as a source of unnecessary litigation." *Specialty Healthcare*, 356 NLRB No. 56, at *4 (2010). The Board quoted the bipartisan Commission on the Future of Worker-Management Relations as having reported, in 1994, that "parties engage in litigation over the scope of the unit for tactical purposes such as to delay an election." *Id*.

does not compel ... representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit." *Northrup Gruman*, 357 NLRB at *5 (*quoting Federal Electric Corp.*, 157 NLRB 1130, 1132 (1966)). Indeed, *Specialty Healthcare* is to be applied "for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees." *Specialty Healthcare*, 357 NLRB at *20. That is precisely the situation here.⁵

Beyond the fact that the Employer's argument is wholly inconsistent with the statutory language, Board precedent, and *Specialty Healthcare*, the cases relied on by the Employer are also inapposite.

The Employer attempts to support its position that "wall to wall production and maintenance units are presumptively appropriate where the employer's operation is highly integrated" by citation to *Buckhorn, Inc.*, 343 NLRB 201 (2004) and *TDK Ferrites Corp.*, 342 NLRB 1006 (2004). Neither case finds that such units are "presumptively appropriate" and both are distinguishable from the present situation. For example, the Board in those cases cite to a high degree of interaction among all production and maintenance employees (*Buckhorn*, 343 NLRB at 203; *TDK Ferrites*, 342 NLRB at 1007) as well as a narrow disparity in skill level

⁵ The Board has also rejected similar requests for review. In *Gen. Elec. Co.*, 14-RC-073765, 2012 WL 2046932 (N.L.R.B. June 6, 2012), the Board found no issues warranting review where the regional director relied on *Specialty Healthcare* and found (1) the petitioned-for unit was appropriate and (2) where the employer argued for a presumptively appropriate unit, the employer had failed to show an overwhelming community of interest with the employees in the petitioned-for unit. Case 14-RC-073765, Decision and Direction of Election (March 12, 2013). Specifically, it was noted "contrary to the Employer's contention, even though the larger unit sought by the Employer is also appropriate, this does not shift the burden to the Petitioner to rebut the presumptive appropriateness of the Employer's unit. Rather, the burden is on the Employer to establish that the employees in the [presumptively appropriate unit] share such an overwhelming community of interest with the petitioned-for unit as to require their inclusion. The Employer has not done so." *Id.*

between the maintenance employees and the production employees. *Buckhorn*, 343 NLRB at 203; *TDK Ferrites*, 342 NLRB at 1008.⁶ Both factors are in direct contrast to the findings of the Regional Director in this case. RD Dec. 7-8.

Moreover, both cases cite to the Board's "longstanding policy, as set forth in *American Cyanamid Co.*, 131 NLRB 909 (1961), to find petitioned-for separate maintenance department units appropriate where the facts of the case demonstrate the absence of a more comprehensive bargaining history and the petitioned-for maintenance employees have a community of interest separate and distinct from other employees." 343 NLRB at 202; 342 NLRB at 1008. "In determining whether a sufficient community of interest exists, the Board examines such factors as mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." *TDK Ferrites*, 342 NLRB at 1008 (*citing Yuengling Brewing Co. of Tampa*, 333 NLRB 892 (2001); *Ore-Ida Foods*, 313 NLRB 1016, 1019 (1994), *enfd*. 66 F.3d 328 (7th Cir. 1995)). Such a standard is not dissimilar from the one enunciated in *Specialty Healthcare*.

Facts showing the welders' separate and distinct community of interest are abundant here (*see infra*). For example, as the Regional Director found, the CNH welding employees "possess unique skills and/or training" and "[no] other direct production department (i.e. Fabrication, Welding, Paint, or Assembly) employees require this level of skill before the Employer hires

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⁶ The Employer also cites to *North American Aviation, Inc.*, 162 NLRB 1267 (1967), for the proposition that a "continuous flow manufacturing process impacts the unit determination." Er. RR 38. In that case, however, the Board based its finding on the "frequent contacts between and interdependence of welders and nonwelders in performance of their duties, common supervision of welders and nonwelders, and the fact that the welders are themselves separated from each other both on a geographic and supervisory basis...." 162 NLRB at 1271. Such "frequent contacts," "common supervision," and geographic separation among the welders are not present here.

them." RD Dec. 6. More importantly, the Regional Director found that even despite the notion that "the Employer's Goodfield facility is functionally integrated, each of the departments has a separate role in producing farming equipment." RD. Dec. 7.

It is clear that *Specialty Healthcare* is the appropriate standard in the instant case. The Regional Director appropriately applied the decision in *Specialty Healthcare*. The Employer's attempt to avoid the "overwhelming community of interest" standard and turn the statutory language on its head should be rejected. The Regional Director properly found the petitioned-for unit to be an appropriate unit, and the supposed existence of a "presumptively appropriate" unit does nothing to change the fact that the Employer *failed to prove* employees in the proposed larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Accordingly, for the reasons provided, there is no substantial question of law or policy warranting review and the Request for Review should be rejected and denied.

IV. THE REGIONAL DIRECTOR PROPERLY FOUND THE EMPLOYEES IN THE APPROVED UNIT SHARE A COMMUNITY OF INTEREST AND ALSO PROPERLY FOUND THE EMPLOYEES IN THE APPROVED UNIT DO NOT SHARE AN OVERWHELMING COMMUNITY OF INTEREST WITH ANY OTHER EMPLOYEES.

The Employer argues the Regional Director's Decision is clearly erroneous on substantial factual issues with respect to two of the eight "community of interest" factors – separate supervision and interchange. The Employer also generally argued that the Approved Unit is not an identifiable group that shares a community of interest. In making these arguments, the Employer mischaracterizes and vastly overstates the nature of the record in this matter. As established below, the Regional Director's Decision is not clearly erroneous on substantial fact issues such that it prejudices the Employer.

A. The Regional Director properly found there was nonexistent or insufficient separate supervision and interchange.

When determining whether employees in a proposed unit share a community of interest, the Board examines the following factors:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. United Operations, Inc., 338 NLRB 123, 123 (2002).

As mentioned, the employer must demonstrate that the proposed unit, consisting of employees readily identifiable as a group who share a community of interest, is nevertheless *not* appropriate because the smallest suitable unit should contain additional employees who share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at *15. The Union agrees with the Regional Director that CNH has "failed to show that employees in the welding classification share an 'overwhelming' community of interest with the rest of the production and maintenance employees to require an expanded unit." RD Dec. 6.

1. Separate Supervision – The Approved Unit employees are separately supervised.

The employees in the Approved Unit are separately supervised at the facility. Tr. 158. Brian Blankenship, a manufacturing specialist for CNH, testified that, as a best practice, supervisors at the facility manage certain groups with similar processes. Tr. 137. In other words, distinct supervisors oversee the various distinct operations at the facility. Further, all of the supervisors for the Approved Unit share one office. Tr. 386. The Regional Director similarly found that each department is overseen by a Business Area Manager and various

department supervisors. RD Dec. p. 3. The Regional Director also found:

All of the welders ultimately report to the Welding Business Area Manager. The Welding Business Area Manager supervises four Supervisors in the Welding Department. The Supervisors make the work assignments for the welding employees. Each of the welders must also possess unique skills and/or training to be hired into the Welding Department. Moreover, the tools and safety equipment the welders use is unique to welding as each department has its own unique safety equipment. While all the hourly direct production employees are paid similar wages, there is little contact between the departments. RD Dec. p. 6-7.

In its Request for Review, the Employer makes much of the fact that in his Decision and Direction of Election, the Regional Director found that "[a]ll of the welders ultimately report to the Welding Business Area Manager." The Employer reads too much into this statement and attempts to manufacture a "clear error" by suggesting that the Regional Director found that *all* welders *always and only* report to the Welding Business Manager. This attempt to essentially create an error is not consistent with the record.

As the Employer's own witness testified, there are "distinct operations" between the departments and the Employer's "best practice" is to have supervisors manage such departments "with similar processes." Tr. 137. Further, it was established that the Employer has three business area managers, the departmental supervisors report to the business area managers and the hourly employees report to their supervisors. Tr. 211-212. In effect, the Regional Director correctly found that the Employer's practice is to have employees ultimately report to the Business Area Manager.

Further, regarding the Employer's assertion that five welders report to the "Paint Department," the record is not so conclusive. While the employer testified to their "belief" that these five welders reported to the Paint Department, they also admitted that these welders are physically located in the Welding Department, they are performing welding work (not painting), and they were not sure who they would report to if they had a question about the work they were

doing – welding. Tr. 169-172, 397. As a result, the Regional Director could have concluded, based on the Employer's "best practice" and structure, that since these employees are performing welding work in the Welding Department, they ultimately report to the Welding Business Area Manger regarding the welding work. The fact that these employees may also report to the Paint Department in some respects does not take away from this conclusion. With respect to the three employees that allegedly report to the Quality Department, the Employer *admits* that they are assigned *at various times* and possibly on *a part-time basis*. Er. RR p. 15. Again, this does nothing to take away from the conclusion made by the Regional Director – welders ultimately report to the Welding Business Area Manager.

Even if, *arguendo*, the Employer's characterizations of the record were accurate, the Employer is distressed at the Regional Director's use of "all" when it asserts that eight (8) out of the 138 employees (or approximately 5-6%) in the welding classification do not report to the Welding Area Business Manager. Similarly, the Employer argues that the Regional Director should have made more of the alleged fact that "nine or ten" assemblers are assigned to the Welding Department and therefore report to Welding Department supervisors.

As mentioned, in order for a Regional Director's decision to be overturned under Section 102.67 of the Board's Rules and Regulations, it must be based on "a *substantial* factual issue [that] is *clearly erroneous* on the record and such error *prejudicially affects* the rights of a party." (emphasis added). It is farcical to suggest that these are "substantial factual issues" or that the Employer's rights have been "prejudicially affected" by such statements. The exact same is true for the Regional Director's decision not to consider the nine or ten assemblers who work in the Welding Department. Their numbers are completely insignificant when considering the amount of employees in the Welding Department as a whole.

In sum, the Regional Director properly found that the employees in the Approved Unit ultimately report to the Welding Business Area Manager, the Employer mischaracterized the record, and as a whole, the Employer has failed to carry its burden to show either that these statements were either a "substantial factual issue" or that its rights were "prejudicially affected."

2. Interchange – The Regional Director properly found there was insufficient interchange to achieve an overwhelming community of interest.

The Regional Director found "that there is little evidence to show that many employees outside of the Welding Department perform any welding employee functions." RD Dec. 7. The Employer argues, however, that the Regional Director "ignores" and "mischaracterizes" the evidence regarding interchange of employees. Er. RR 19.

As noted, the amount of interchange between employees is just one of many factors that the Board looks to under its community of interest analysis. *See United Operations, Inc.*, 338 NLRB 123, 123 (2002). In this case, the Regional Director correctly held that:

As for interchange amongst employees, there is little evidence to show that many employees outside of the Welding Department perform any welding employee functions. While some welding employees may occasionally perform work outside of their department or perform traditional material handling functions, the evidence shows that these are not part of their everyday job duties. In addition, when welding employees are performing job duties not traditionally part of their job function, they are permanently assigned to these job duties. RD Dec. 7.

[Further], while welders may occasionally perform work in other departments, it is clear that welders spend most of the time performing welding work within their department. Few employees outside of the Welding Department perform welding work because the Employer seeks employees for the Welding Department who have at least three years' experience as a welder or one year of technical training. No other direct production department (i.e. Fabrication, Welding, Paint, or Assembly) employees require this level of skill before the Employer hires them. RD Dec. 6.

The substantial burden is on the Employer. "[I]n cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community

of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Specialty Healthcare*, 357 NLRB at 1 and n.28; *see also Guide Dogs for the Blind*, 359 NLRB at slip op. at 6; *Fraser Eng'ring*, 359 NLRB at slip op. at 1.

Importantly, it was established at the hearing, and the Regional Director agreed, that welders are highly skilled and practically no one transfers into welding due to the skills required. RD Dec. 6-7. Mr. Blankenship testified that only about once or twice a month will someone from outside the welding department perform welding on an overtime basis, which is the only instance when someone from outside the welding unit would be performing welding work. Tr. 166.

Such "interchange" only going one way (*i.e.*, non-welders perform welding work on only a very limited basis) has been found by the Board *not* to support the interchange factor under the community of interest analysis. Specifically, the Board in *DTG Operations*, *supra*, held that "such limited, *one-way* 'interchange' [would] not require" the inclusion of non-welders in the appropriately-found unit. *DTG Operations*, *Inc.*, 357 NLRB at *8 (emphasis added).

Additionally, the fact that any interchange is only going one way is further support of the uniqueness and exceptionality of the work that welders perform. In other words, the welders are so highly trained and their work is so distinct that employees outside the welding department are unable to perform that function for the Employer.

Despite the clear existence in the record of only one-way interchange, the Employer has still argued that approximately 46% of welders have engaged in substantial interchange. This flawed statistic cannot be supported by the record.

First, it must be noted that this 46% number relies on hearsay and information that is not contained in the record. At hearing, the Employer submitted an exhibit (Er. Exh. 8) prepared for the hearing that cannot be considered reliable. *See Mid-States Express, Inc.*, 353 NLRB 864, 873 (2009) (describing statement as "nothing more than hearsay and, therefore, unreliable"); *In re NRNH, Inc.*, 332 NLRB 300, 306 (2000) (finding that documents were "of very little probative value" due to reliance on hearsay); *Willamette Industries, Inc.*, 306 NLRB 1010, 1014 n.3 (1992) (placing "little or no credence" on testimony containing hearsay). The Union properly objected to this exhibit due to lack of foundation and hearsay. Tr. 380. Mr. Richard Curtin, a CNH weld supervisor, testified that the exhibit was *not* prepared in the normal course of business at CNH. Tr. 335. Further, Mr. Curtin testified that he did *not* check to determine whether each employee listed in the exhibit had a title/classification change – he only included the employee's current title. Tr. 395. Also, Mr. Curtin testified that much of the information in the exhibit was not filled-in by him; rather, he emailed it to other supervisors to complete. Tr. 336. Those "other supervisors" did not testify at the hearing.

Further, of the 166 employees listed in the exhibit, Mr. Curtin only testified regarding 34 of the employees. *See infra* footnotes 8-12. Accordingly, the remainder of the exhibit should be disregarded as it is hearsay, not based on individualized knowledge, and without any supporting testimony.

In addition to the fact Employer has not submitted valid evidence on the 132 employees,⁷ it has also mischaracterized the interchange of the other 34 employees. As a whole, the amount

⁷ The Employer also did not properly present evidence on alleged interchange at hearing. In addition to introducing an unreliable exhibit (Er. Exh. 8), the Employer failed to present evidence regarding the *percentage* of interchange. Under similar circumstances, the Board has rejected the interchange data. *See New Britain Transp. Co.*, 330 NLRB 397, 398 (1999) ("The presumption has not been rebutted where an employer's interchange data is represented in

of non-welding work performed by welders in other departments is minimal. Considering the number of hours worked by the 138 full-time welder operators on a yearly basis (Tr. 46), the testimony by Mr. Curtin regarding 34 employees with alleged temporary non-welding assignments is insignificant.

More importantly, many of the alleged non-welding assignments were factually inaccurate or irrelevant to the community of interest inquiry. First, it must be noted that Mr. Curtin incorrectly identified 14 welders as performing non-welding work. Cross-examination of Mr. Curtin made clear that each of these 14 employees were in fact performing welding-related functions on a temporary basis despite being in other departments.⁸ Second, two other employees were actually voluntarily seeking other activities, such as overtime.⁹ These voluntary activities are generally not relevant to the community of interest inquiry. See Judge & Dolph, Ltd., 333 NLRB 175, 185 (2001) (noting the "subjective desires of particular employees are not

aggregate form rather than as a percentage of total employees.") (citing Dunbar Armored, Inc. v. NLRB, 186 F.3d 844, 849 n.5 (7th Cir. 1999); Walgreen v. NLRB, 564 F.2d 751, 754 (7th Cir. 1977) (holding that where employer's interchange data was represented in aggregate form rather than as a percentage of total employees, "we have no basis for doubting the Board's conclusion that the amount of employee interchange ... is either 'not substantial' or is 'minimal'").

⁸ Bickel – performing a welding function (building paint racks in welding shop) on a daily basis (Tr. 396); Barnum – re-weld/fixing defective welds using welding tools; receives work outside welding chain of command (Tr. 398); Blasdel – tool certification for weld fixtures for three-tofour months (Tr. 399); Bozarth – same as Blasdel, tool certification for weld fixtures, two months a year (Tr. 400); Greiser – primarily picked up welding parts (Tr. 404); Snowden – acted as a team leader for one shift (Tr. 409); Wagner – same as Barnum, doing welding 100% of the time (Tr. 411); Weatherington – same as Barnum (Tr. 412); Wyman – same as Blasdel, tool certification for weld fixtures (Tr. 413); Dodge – checks for bad welds, which only a welder or quality control person can do (Tr. 416); Medearis – same as Dodge (Tr. 417); Mize – performed welding 90% of the time (Tr. 418); Schumm - same as Wagner, temporary team lead in welding (Tr. 421); Vogelsang – same as Wagner, serves as temporary team lead in welding once or twice a month (Tr. 423);

⁹ King – is in weld every day, voluntarily seeks overtime in other departments (Tr. 349, 406); Seifert – voluntarily participation in safety committee and welds the rest of his time (Tr. 422).

'generally relevant in Board unit determinations," and rejecting arguments that the temporary interchange factor is governed by the discretionary overtime requests made by employees.)

(internal citation omitted).

Third, an additional 15 welders operated in other positions for extended periods of time due to shortage of labor. ¹⁰ The Union submits, and the Regional Director agreed, that these instances are more properly construed as previous instances of "permanent interchange" which is given less weight by the Board in deciding unit scope issues. ¹¹ *See Bashas, Inc.*, 337 NLRB 710, 711 n.7 (2002) (permanent interchange is a less significant indicator of community of interest, and thus is given less weight by the Board in deciding unit scope issues).

When these inaccurate or hardly relevant instances of alleged interchange are disregarded, the Employer could only identify four (4) instances of what is more ordinarily

 $^{^{10}}$ Cape – driving forklift for entire shift for several months due to lack of forklift drivers (Tr. 401); currently assembling kits for painting department (Tr. 343); Crispin – driving forklift fulltime for four months (Tr. 401); O'Brien – worked in WCM full-time for three months (Tr. 406); Rosson – operates forklift two or three days a week in welding department and acts as gatekeeper 90% of the time (Tr. 407); Routley – performing workplace organization for all departments on a full-time basis for two to three months, not aware when assignment will end (Tr. 408); Spradley - operated forklift for weld on full-time basis for two months, does not know when or if assignment will end (Tr. 410); Boley – worked in fabrication full-time for three weeks (Tr. 413); Dockins – has been a third-shift welder for two months; previously worked in WCM but witness had no firsthand knowledge of work performed for WCM (Tr. 363, 415); Peppers – operated forklift for weld on full-time basis for six months (Tr. 370, 418); Riley – worked as gatekeeper on full-time basis for year and a half, but was not reclassified, and is now welding full time (Tr. 420); Wheeler – assembly full-time for four months (Tr. 424); Meyers – working as gatekeeper and also dock and receiving for few months (Tr. 425); Murphy – kitting on a daily basis for a few months (Tr. 418).; Buckman – has organized weldments as a special project for about three months (Tr. 359, 413); Dettore – worked as a gatekeeper for two weeks in welding department with no end in sight to the assignment (Tr. 361).

¹¹ Notably, because Mr. Curtin did not check whether any of the employees' title or classification changed, the Employer has not presented evidence to sufficiently identify whether these interchanges were in-fact permanent or temporary in nature.

considered temporary interchange or transfers. ¹² See Mavis Tires Supply Corp. Employer & Local 1430, 2-RC-22815, 2004 WL 1920861 (N.L.R.B. May 5, 2004) ("A temporary transfer is used to cover for an employee who is on leave."); Novato Disposal Servs., Inc., 330 NLRB 632 (2000) (identifying temporary transfer as working in a different position during a portion of each day or on an "as needed" basis). Further, the testimony of Mr. Blankenship made it clear that interchange is "unusual" and occurs infrequently:

Q: Okay. Well, it's correct, isn't it, that the welders at CNH only weld unless they're specifically directed to do something else, and that's only under unusual circumstances?

A That's correct. The supervisor will make assignments and predominantly the expectation is we want welders to weld production parts. If there's another need, then supervisors would make that assignment.

Q And that's unusual?

A We'd have to define unusual, right? But it's not an expectation we have everyday if they work on something else.

Q Well -- in a normal month?

A I don't.

Q Ten or less, or ten or more?

A Less than ten.

Tr. 150-151.

Considering the foregoing, the amount of temporary change is insignificant, especially in light of the other community of interest factors. Evidence put on by the Employer does not demonstrate that there has been "a merger" of the welders with the remainder of the hourly

¹² Boone – kits carts one or twice a week and assembles tiger-mate twice a month (Tr. 341-342, 400); Crow – kitting 50% of the time and welding 50% of the time (Tr. 345, 403); Johnson – helping with re-creation of kitting for tiger-mate 50% of the day for a "couple months" as a special project (Tr. 347, 405); Trammel– assembling tiger-mates once or twice a week and welds 100% of the time otherwise (Tr. 422-23);

employees. *See Dean Transp., Inc.*, 350 NLRB 48, 59 (2007). Nor does it show "the type of periodic temporary transfers or lateral, two-way transfers between departments that may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills." *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987).

In sum, Employer's "46%" figure is inaccurate and flawed, and the existence of one-way interchange establishes that the Regional Director's findings were proper. The interchange of employees between welding and other departments is minimal. Given how much separation is otherwise present among the different classifications, these instances of employee interchange do not come close to support a finding of an overwhelming community of interest among all production and maintenance employees such that all their interests "overlap completely."

B. The Approved Unit is an Identifiable Group

The Employer takes exception to the Regional Director's conclusion that the welding employees are an "identifiable group." Er. RR 12, 28. Specifically, the Regional Director correctly found that "the evidence demonstrates that the employees in the welding classification constitute an identifiable group. For example, the employees in the welding classification are referred to as the welding department, they have their own classification numbers, and they are the only department that has their work tracked." RD Dec. 6. The Board has identified the "readily-identifiable-as-a-group" factors to be the following: job classifications, departments, functions, work locations, skills, or similar factors. *Specialty Healthcare*, 357 NLRB at *12. For similar reasons as to why the welders share a community of interest, the Regional Director's conclusion that they are also identifiable as a group is easily supported by the record.

1. The Welders are organized and classified into a separate department.

The evidence presented at hearing clearly demonstrated that the CNH welders are housed, segregated and classified into a department that is separate from the facility's other departments.

Mr. Blankenship testified that there are nine different departments at the CNH Goodfield facility: material, fabrication, welding, paint, assembly, tool and die, quality, maintenance, and World Class Manufacturing ("WCM"). Tr. 136. Each department is a "distinct operation," (Tr. 137) and each "has their own talent [and] knowledge set to perform their operation." Tr. 139. Additionally, each department has its own "reference number" and the welders in the weld department are recognized as "604." Tr. 142-143. Mr. Blankenship also testified that the Welders performed work in a segmented building. ¹³ The building welders perform work in is "predominantly the welding area," (Tr. 167), and will become entirely the welding area in the "short term." Tr. 118-119. Absent a few exceptions, the welders themselves "typically would not have reason to move" in and out of the welding building. Tr. 168. Further, the welding equipment they use is also big and heavy such that the equipment is not moved very often and can only be moved at all by use of a forklift. Tr. 154.

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¹³ Mr. Blakenship's testimony described the different structures at the CNH facility. What appears to be one building from an aerial view (Er. Exh. 2) is, in-fact, several different, connected structures that have been built by CNH over a period of time. Tr. 116-19. The initial structure was built sometime in the "early 60s" (Tr. 113) and houses the front office, the fabrication department, the quality department, maintenance, and the central office for the staff. Tr. 114. The welders, meanwhile, are located in an adjacent building built in the 1970s. Tr. 118. The welding department is connected to the "1960s building" on one side by ramps (Tr. 116) and on the other side to a new building by overhead, garage-style doors. Tr. 120. Other than those access points, the welding department is walled-off and physically separate from the other departments.

2. The Welders' skills and training are distinct.

Welders at the CNH facility are highly skilled and receive separate and distinct training from the employees in the other departments – in fact, "each department has their own skill set that adds value." Tr. 128. Welders are not trained to complete the complicated tasks that are achieved in the facility's other departments. Tr. 388-89. In order to even be considered for a welding job at CNH, an applicant must have three years of welding experience or one year of technical training. Tr. 148. Welder operators also have to take and pass a separate welding test administered by the company before being hired. Tr. 151; Union Exh. 4.

Additionally, welders are tasked with reading special blueprints specific to their job function, which Mr. Blankenship testified took a "high degree of skill" to read. Tr. 144. Each department has their own individual "prints that they use to perform their quality operations." Tr. 144-45. Welders in particular must be able to read their technical prints in order to properly lay out the pieces of metal in order to weld them into proper configuration. Tr. 144-45. This is not a skill that other classifications would be expected to perform. Welders also must be able to "read certain kinds of symbols and other instructions on the blueprints in order to do the welding layout...." Tr. 145. These symbols are unique to the welding industry and the employees in the welder classification at CNH are expected to be able to read and understand them in order to do their job properly. Tr. 146. People without a background or training in welding would be unable to read these symbols. Tr. 147. Mr. Blankenship testified that the welders at CNH "only weld unless they're specifically directed to do something else, and that's only under unusual circumstances." Tr. 150.

It is clear that welders have a very specialized work background that is separate and distinct from CNH's other skill classifications. No other classification shares these similarities unique to welders.

When asked whether any other employees performed welding, Mr. Blankenship suggested the WCM employees may perform welding, but he could not identify whether any of the six WCM employees have the necessary qualifications. Further, Mr. Blankenship testified that WCM employees have not been called to perform welding "very much" in the last year, and that "[WCM's] normal task isn't to support ongoing operations." Tr. 150.

3. The Welders' job functions and work conditions are distinct.

Welders have a highly detailed job description outlined in Union Exhibit 1. A brief review of their job responsibilities and duties in relation to the other job descriptions clearly indicates the distinct nature of the welders' job functions as compared to the other classifications at the CNH facility.

In addition to the welders' aforementioned unique job responsibilities, welders at CNH use equipment that is very different from other departments. Tr. 160. For example, Mr. Blankenship testified that the fabrication department uses "equipment that's much more expensive" than the welders', and that fabricator machines "are much more specific, so it takes time on the machine to get them fully ready to run the machine by themselves." Tr. 160-61. In fact, it would be very difficult to simply interchange a welder with someone from another department such as fabrication; as Mr. Blankenship put it, "each person has to have experience in their area." Tr. 161.

Welders also have their own personal protective gear that's unique to welders. Tr. 161.

Across the different departments, the protective gear worn by the employees "is customized to

the area, [] based on [the] risk of that exact operation." Tr. 162. Welders specifically wear a "weld hood" (Tr. 162) to protect their eyes as well as a specific type of glove (in fact, "each department actually has their own set of gloves that they need to wear"). Tr. 164. Each department has its own set of safety risks that vary from to department to department. Tr. 164.

Additionally, welders are the only employees at CNH who work under conditions that allow an individual welder's work to be tracked. Specifically, each welder operator has his own "weld stamp" that allows the company to identify which weld a particular welder completed. Tr. 165. It provides for "accountability and traceability." Tr. 165. This ability to trace a particular welder's work is unique to the welding department.

As can be seen, the welder's status as "readily identifiable as a group" is easily established, and the Employer's contention to the contrary is clearly wrong.

V. CONCLUSION

"The Board will grant a request for review only where compelling reasons exist."

Section 102.67(c), NLRB Rules and Regulations. The Employer has completely failed to put forth any compelling reason sufficient to meet this standard. Given that the welders are readily identifiable based on their job classification and share a community of interest with each other, the Employer needed to demonstrate that the other production and maintenance employees share an *overwhelming* community of interest with the welders such that there is "no legitimate basis" upon which to exclude them. *Specialty Healthcare*, 357 NLRB No. 83 (2011). As found by the Regional Director, the Employer was unable to meet this extremely high burden. The Request for Review should be rejected and denied.

Respectfully Submitted,

Date: January 10, 2014

/s/ Jason R. McClitis

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2014, I electronically filed Petitioner's Statement in Opposition to Employer's Request for Review of Decision and Direction of Election Issued by the Regional Director via the NLRB's e-filing system and forwarded a copy by electronic mail to the following:

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